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No. 88-118

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GO AIR, INC. **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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September, 1988

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I. GOVERNMENT CONCEDES NEED FOR PROMPT HEARING; THUS THE ONLY ISSUE: IS THE NINTH CIRCUIT SOLUTION APPROPRIATE?

By failing to deny that the emergency power is the executive-branch equivalent to a judicial temporary restraining order (TRO), the government obviously concedes that it is. Additionally, by citing Nevada Airlines Inc. v. Bond, 622 F.2d 1017 (9th Cir. 1980), it concedes the need for a prompt hearing on whether there is a valid emergency. That case was the first to note that that issue is distinct from the underlying charges and thus requires a prompt hearing rather than await the 60-day NTSB decision which considers only the merits of those charges--a delay that assuredly will destroy almost any aviation operation.[1]

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[1] The FAA never takes emergency action against large operators, Continental Airlines, for instance. The number of employees is too great, the political fallout would be too intense. The largest we know of was Province-Town Boston Airways with 1200 employees. But FAA rushed two-dozen inspectors in that week-end to

Rather than simply hold 49 U.S.C. § 1429(a) unconstitutional, the Ninth Circuit tried to paste together a fix by noting that FAA orders, pursuant to 49 U.S.C. § 1486, are subject to review by the circuit courts.[2] Since this section gives petitioner a choice between his geographic circuit and the District of Columbia, how would one know whether the latter would honor the former's ruling? The Fourth Circuit? The Tenth? . . . The government does not tell us. Nor do they tell us why this solution went undiscovered for over two decades. No

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recertify the airline. It is well-known their goal was to oust top management. A healthy and decades-old airline, the blow forced PBA into Chapter 11; when rescued by another carrier it was within 24-hours of shutting down for good.

[2] There is no indication in Nevada Airlines that the Ninth Circuit was aware of the strong Congressional mandate in 49 U.S.C. § 1487 to the district courts to afford similar relief, which of course would have provided due process. (Does not this section refute the holding in that case that the district court lacked subject matter jurisdiction?)

legislative history indicates Congress had review of the emergency power in mind when it wrote section 1486.

The government makes no attempt to refute our argument that Nevada Airlines is a case of a court legislating a solution rather than leaving it to Congress. Who initiates the hearing? With a regular TRO it would be the government, but the Ninth Circuit puts the burden on the operator who then must flounder around trying to figure out what it is he must challenge.[3] What is the time limit? That court didn't say, nor does the government tell us how that would be determined without legislation. FRCP

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[3] See Respondent's Memorandum at 4 n. 5. It is silly for the government to suggest petitioner should have anticipated the emergency action and prepared for it. Not only was it five weeks before action was taken, but FAA officials deliberately violated agency rules by not reviewing the claimed discrepancies with management so it could rebut or mitigate them or demonstrate they had instituted procedures to prevent any future repeat.

65(b) does: ten days.

Any judicial TRO must be supported by sworn affidavits from the proponent. Would that be required under the Ninth Circuit's ruling? Now, FAA officials need explain nothing. How would evidence be presented? Would the petitioner be entitled to use the full panoply of discovery procedures? Subpoena FAA inspectors and cross-examine them? We do not know. Circuit courts are patently ill-equipped to conduct such proceedings--unless they appoint a master, usually a district judge or magistrate, thus putting the case right back where it should have been in the first instance. But the Ninth Circuit failed to say, nor does the government explain.

The government tacitly concedes the TRO character of the emergency power and the need for a prompt hearing; its contention is that Nevada Airlines provides the solution. Thus in our view the only issue

before the Court is whether that solution comports with due process. For the reasons given it does not, and cannot.

II. THE APA ISSUES

The issues raised here strictly involve compliance with APA publication and rulemaking requirements. FAA's emergency power and criteria for its use are no different than the Bureau of Indian Affairs' welfare-fund distribution policy at issue in the Court's leading APA case Morton v. Ruiz, 415 U.S. 199 (1974). Putting that policy in an agency handbook was not sufficient. **Notably absent from the government's brief is any discussion of that case. Or explanation of why under the Civil Aeronautics Administration such a rule was appropriate, see 14 C.F.R. § 408.25 (1952), but not under the FAA, the same agency only with a new name and powers for its administrator?**

In Morton the Court pointed out that in

addition to publication agencies must include in a given rule standards and criteria for its use so the public can be assured "it is being applied consistently and so as to avoid both the reality and the appearance" that it is not. 199 U.S. at 231. This of course is what "immediate protection of the public," etc., is all about. See Petitioner's Brief at 30.

The government uses misleading arguments. It contends FAA need not promulgate rules constraining its discretion as to when to employ a particular enforcement action. Respondent's Brief at 5-6. No such issue has been raised by petitioner. The agency has an emergency policy, its contents are not at issue, only agency compliance with the APA. SEC v. Chenery Corp., 332 U.S. 194 (1947), is inapt and obsolete: no APA issue was raised, evidently for the practical reason that act was passed only the year before--1946.

It is anomalous to suggest that use of the emergency power does not adversely affect the business it pre-emptorily shuts down. Donovan v. Wollaston Alloys, Inc., 695 F.2d 1 (1st Cir. 1982), is a weak reed on which to base that argument. Respondent's Brief at 5. Is an emergency shutdown of less concern than an increase in the cost of food stamps? See Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977) (cited in Donovan, 695 F.2d at 10).

Switching the argument from publication of the emergency policy to whether or not the manual in which it may be found should be published is a red-herring. Respondent's Brief at 5. Neither here nor below has petitioner raised any such issue. The policy is the policy is the policy. It could be written on the administrator's shirtcuff, a table napkin; it need not be written at all. Having it spelled out in an agency manual simply makes it easy to show

what it is.

For its failure to publish or promulgate that policy FAA is in violation of the Administrative Procedure Act; that is a complete defense. We remind the Court that this agency, in its 30 years, has never promulgated a single enforcement procedure rule through APA public notice and comment procedures. That is a sad, if not tragic, commentary indeed.

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